No. 14,431

IN THE

United States Court of Appeals

For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE, and AURORA NICKEL COMPANY, a corporation,

Appellants,

vs.

E. MILES FLYNN,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statement.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Sec. 4, 31 Stat. 322 as amended, 48 USCA, Sec. 101. Since the action is one to determine the adverse claims of appellants to mineral claims it was brought under the provisions of Sec. 56-1-91 Alaska Compiled Laws Annotated, 1949. See paragraphs V, VI and VII of appellee's complaint (Tr. 59-60).

The jurisdiction of this court rests on Sec. 1291 of the Federal Judicial Code.

ANSWER TO APPELLANTS' STATEMENT OF THE CASE.

Appellants' brief contains a "Statement of the Case" which is little more than a summary of the pleadings and various letters written by the respective counsel to each other and to the court regarding the trial date (Pages 11-19). It is followed by a statement of "Evidence" (Pages 19-48) which consists of random selections of evidence from the record which, standing alone, give the impression that the witnesses presented by appellee were incompetent to testify as they did and their testimony is insufficient to establish appellee's title which is the subject of Point 11. This statement wholly disregards the requirement of making a fair statement of that evidence which, if believed by the court, would serve as a basis for its decision, and makes no attempt to present it in the most favorable light to the appellee. We deem it necessary to present a correct statement of facts regarding the staking of the claims, which the court might have found as a basis for its decision, in order to put the case in its proper perspective.

The witnesses, Norppa and Flynn, went to Yakobi Island, in Southeastern Alaska in October and November 1952 with a helper and located the 45 lode mining claims listed in the judgment as having title quieted in appellee.

The corners established by Mr. Norppa and the boundaries marked on 37 of the claims are shown by a red line drawn by Mr. Norppa along the boundaries and posts on Exhibit 1, by direction of the court (Tr. 225, 240). In open country where no blazing of lines

was possible or marking necessary, he did not travel along the lines or do any blazing and has not marked the map in such places with a red line (Tr. 221, 248-250). Also where there were cliffs which could not be climbed he did not blaze the lines (Tr. 255).

Along the lines indicated by a red line on Exhibit 1, Mr. Norppa established corner and center end posts or mounds with posts in them (Tr. 217-221, 223, 231), marked the posts with crayon pencils (Tr. 252-3), blazed the trees along the boundary lines (Tr. 217-221, 223, 231), posted a few location notices indicated by red circles (Tr. 221, 250A), noticed mineral outcrops where he posted notices (Tr. 221) and caused notices to be recorded as location certificates which were identical to the location notices posted by him and Mr. Flynn.

Mr. Flynn, like Mr. Norppa, was an experienced mining engineer (Tr. 211, 212, 265-267), who had studied government reports on the nickel deposits in Bohemia Basin (Tr. 268) and was familiar with the accounts and locations of the ore bodies which covered large irregular areas and do not occur in veins (Tr. 280, 281). He testified that along all claim boundary lines on Exhibit 1, other than those indicated by a red line, he established corner and center end posts or mounds with posts in them (Tr. 283, 298), marked these monuments to identify the monuments (Tr. 283), made discoveries on each claim and a separate discovery for each claim (Tr. 281, 282, 283, 295, 301-305), posted notices of discovery (Tr. 285, 294, 300, 317), marked the claim boundaries (Tr. 283) and

recorded duplicates of the location notices as certificates of location (Tr. 285, 286—Exhibits 2 and 3). He staked Portia 10 and 11 (Tr. 284, 285) and the six Pelican claims (Tr. 288, 291, 292, 294) mentioned in the judgment, in the same manner as the 37 claims previously staked, and recorded the certificates with a map to further identify the claims (Tr. 309, Ex. C).

The validity of the locations by Messrs. Norppa and Flynn are the subject of appellants' point No. 11.

During the winter of 1952-53 appellee became aware of the prior recording of location notices by appellants for 19 claims in October 1950, and 9 claims in July 1952 in about the same location.

In the spring of 1953, when the snow had melted sufficiently, appellee and the witnesses Johnson, Klein and Harrigan made various trips from early May to late November to appellee's claims to determine whether prior locations had actually been made by appellants which conflicted with appellee's claims and to make accurate surveys of both the Flynn claims and any evidence of conflicting locations by appellants. Appellants were then in the process of amending their locations made in 1950 and 1952. No evidence whatsoever, of any locations by appellants, was found by the witnesses Flynn, Johnson, Harrigan or Klein, the last three being disinterested professional men (Tr. 253, 254, 262, 295, 657-663, 665, 669, 682-683). Johnson made, with the help of others under his supervision, a chain and stadia survey of all evidence of locations by appellee and by appellants, except on the Pelican group and where no conflicts would arise (Tr.

164). From these surveys he prepared appellee's Exhibit No. 1 to show the Flynn claims. In the appellants' statement of the Evidence on Page 22 of their brief, it is stated that this exhibit was introduced over the objection of appellants as to remoteness on a promise to connect up the survey of the posts and lines as found in the fall of 1953 with the posts and lines as established in 1952 by Flynn (Tr. 165, 166). At Page 74 of appellants' brief it is stated that no such connection was made by appellee. This is untrue as appears by the testimony of the witnesses Flynn (Tr. 282-284), Norppa (Tr. 215-220) and Johnson (Tr. 171, 612). They also made a map, Appellants' Ex. 6, of all posts, monuments, blazes, boundary markings or other evidence of appellants' purported locations (Tr. 578-580) which was also made as a transparency using the same scale and co-ordinates, Appellants' Ex. 7, so it can be superimposed on appellee's Exhibit No. 1 (Tr. 619). These evidences of an attempt to locate or relocate claims were all created in 1953 as shown by the testimony of Mr. Johnson (Tr. 614) and Mr. Klein (Tr. 683-685).

In appellants' Third Defense, they allege these claims were located by appellant Pape in October 1950 and July 1952 and relocated in the summer of 1953 at which time the Svere No. 3 claim was located for the first time. Appellants have not introduced any testimony whatsoever to even attempt to prove any of these locations. It is true that they have introduced assessment affidavits, recorded location certificates and the deposition of Mr. Pape which covers

all his other activities, but there is still no evidence of discoveries, marking of boundaries or any posts or monuments being erected by Mr. Pape, except for the Nina discovery monument and location notice as stated by Mr. Harrigan (Tr. 662, 663). By Mr. Pape's own admission he didn't know how to stake a claim properly, never blazed or marked any boundaries on the ground, used five instead of seven posts or monuments, made no discovery in any case and put his location notice on a corner post instead of on a discovery post (Tr. 655, 664, 665). He admitted he staked only the Nina in July 1950 before it was opened to location in October 1950 and came back in October and staked almost the same area as the Svere Claim (Tr. 662, 663, 667). There was no evidence of anything being done to locate the Svere, other than two nails in a post (Tr. 662, 663). If the court denied the motion for continuance and for a new trial under the belief that Mr. Pape had no intention of being a witness, it appears from this testimony of Harrigan, a registered Land Office surveyor, (Tr. 653) that any conclusion reached by the Court from the Ward affidavit was confirmed before the motion for new trial came on for argument.

From this evidence the court concluded the Flynn claims were properly located and if there were any deficiencies as to the descriptions in the recorded location certificates, appellants could not question them because they had no claim to the mineral lands whatsoever by reason of never having made a valid location.

The questions arising out of the denial of a continuance for the trial and new trial have been presented by appellants in their statement of the case in somewhat better perspective and the evidence before the court will be discussed in the points hereinafter argued.

ARGUMENT.

POINT 1.

THE COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING THE APPELLANTS TO GO TO TRIAL IN THE ABSENCE OF APPELLANT PAPE.

The following is a chronological list of events leading up to the trial:

June 20, 1953. Mr. Pape told Mr. Ward that he would not be a witness for appellants (Tr. 78).

June 23. Complaint filed (Tr. 8).

July 20-31. Mr. Pape in Seattle, Washington (Tr. 78).

Sept. 10. Deposition of Mr. Pape taken in Seattle (Tr. 343).

Sept. 21. Appellee's motion for Immediate Trial filed (Tr. 75).

Oct. 2. Minute order entered in presence of counsel for both parties setting case for trial to follow a case set for trial on December 14, 1953 at 10:00 a.m. (Tr. 76); appellants informed the court they understood Mr. Pape would be absent in the Far East on December 14th to which the court replied it would

require a motion and proper showing for a postponement (Tr. 137, 149).

Oct. 7. Appellants notified appellee they would insist on a continuance (Tr. 138).

Oct. 12-19. Mr. Pape was registered at the New Windsor Hotel in Seattle, Washington (Tr. 79).

Oct. 17. Appellants were informed Mr. Pape had not gone to the Far East (Tr. 86).

Nov. 7-14. Mr. Pape at his home in Brinnon, Washington (Tr. 79).

Nov. 12. Court informed by appellants' letter that Mr. Pape would not be available December 14th (P. 18 Appendix, Appellants' Brief).

Nov. 14-22. Mr. Pape at New Windsor Hotel in Seattle (Tr. 79). Appellant Vevelstad urged Mr. Pape not to go on voyage to the Far East (Tr. 82).

Nov. 22. Mr. Pape went aboard vessel at Seattle, Washington (Tr. 79).

Nov. 26. Mr. Pape sailed from Seattle for Far East (Tr. 80).

Nov. 30. Appellants filed motion that trial "not be held on December 14, 1953" and stating that Mr. Pape not available until late January, 1954 (Tr. 76).

Dec. 8. Affidavit of George F. Ward filed showing Mr. Pape was in or near Seattle in July, August, September, October and until November 26th (Tr. 50).

Dec. 15. Court found the absence of Mr. Pape was willful (Tr. 152, 154, 155). Appellants refused to pay

costs of appellee if trial postponed (Tr. 158) and case went to trial.

This record shows the appellants started when the case was set for trial to plead the unavailability of the defendant Pape on the date of trial although they had ten weeks to make him available. The appellee took his deposition so as to ascertain the times he made trips to and from the mining claims and the amount of time he spent at the claims, but avoided asking him anything about his locating mineral claims. Appellants' counsel was present when the deposition was taken but propounded no questions (Tr. 432). They simply gambled that if he was not available on December 15th, the court would accept that as an excuse for delaying the trial and that the court would arrange its trial calendar to fit the convenience of the appellant Pape without regard to its own rights or those of appellee.

Appellee received the defendants' letter of October 7th (P. 17, Appendix, Appellants' Brief), notifying appellee that appellants would seek a delay because of the absence of Mr. Pape, but appellee knew Mr. Pape was in Seattle and waited to see what proof appellants would file regarding the absence of Mr. Pape. Counsel for appellants admits he knew on October 12th that Mr. Pape was in Seattle and had not sailed for the Far East, but he did not advise the court or retract his notice (Tr. 86). He allowed the appellee and the court to think Mr. Pape had departed. There was nothing for the appellee to do until called upon

to refute whatever proof appellants submitted in support of the anticipated motion for delay, except that appellee kept informed of Mr. Pape's whereabouts so as to be ready when the motion was filed by appellants. On November 12th appellants again advised the court in an informal manner (P. 18, Appendix, Appellants' Brief) that Mr. Pape would be in the Far East in December but did not state where he was then, when he was leaving, when he would be back or whether Mr. Pape would ever be available. Nor did they submit any formal motion or affidavit. Mr. Vevelstad says he begged Mr. Pape to not go to the Far East on November 26th (Tr. 82, 83). It looks as if appellants knew on or about November 12th that Mr. Pape was planning to depart late that month, so they gave more warning of what they intended to do but failed to even then file a timely motion to ascertain whether the court would grant a delay under those circumstances. The other appellants could have protected themselves by then ascertaining if the court would grant a continuance and if it refused, then Mr. Pape could have been subpoenaed for a deposition under Rule 45(d) F. R. C. P. In fact, since Mr. Pape was deliberately absenting himself, the only safe thing for appellants to do was to subpoena Mr. Pape if his testimony would help them in any way. Instead of making a timely motion they waited until Mr. Pape had departed on November 26th and then filed a motion on November 30th which was not supported by an affidavit as required by Rule 4 of the court below, although it was verified on information

and belief in its entirety by counsel for appellants. No statement was made therein as to when Mr. Pape departed, why he absented himself or what effort was made to obtain his presence for the trial. It was stated he "probably" would return in the latter part of January but it later turned out that he returned January 7, 1954 (Tr. 110). *The court never had any assurance in writing or orally that Mr. Pape would ever appear as a witness.* No time was ever suggested as to when he would be available and even after his return from Korea he stated (Tr. 110) that he was "interested" and "anxious" to appear but he never has promised that he would. The evidence before the court in the affidavit of George F. Ward was exactly to the contrary and showed that Mr. Pape had expressed himself as refusing to be a witness (Tr. 78, 79).

It is apparent from the affidavits filed and the actions of Mr. Pape that he had told Mr. Ward the truth and had been hiding his true intentions from the other appellants. No other theory is consistent with his being in Alaska and the vicinity of Seattle from June to November, except for a trip to Korea in June and July, and then shipping out just before this case was coming on for trial. His only excuse for not complying with Mr. Vevelstad's request to not leave, was that he would lose his job, which is questionable.

From November 26 to January 7th Mr. Pape would probably not earn more than $800.00. In his counterclaim he states the appellants sustained $5,000,000 in

damages by reason of being delayed in their working the claims. It seems fantastic that Mr. Pape would delay his chances of making his share of such an enormous sum for fear of losing a job as an electrician. It is also fantastic that any government agency would discharge a man for attending so important a trial in which he had such an interest. It is also fantastic that he was too old to sail October 4th (R-138) but not too old to sail November 26th. The court was entitled to consider all these inconsistencies.

If Mr. Pape was just a witness, he would have no interest in the controversy. But he was a defendant and as his counsel stated in the argument on the motion, Mr. Pape is an officer and stockholder of Aurora Nickel Company. As a defendant he was presumed to be interested. If he is to be allowed to absent himself willfully and claim a right to be at the trial, the court must arrange all its trials for the convenience of every party. As for the other appellants, they were in touch with Mr. Pape, they knew his intentions and they should have protected themselves by a timely motion and a subpoena for a deposition if necessary.

The record shows the extreme inconvenience which would have been caused to appellee and the heavy expense incurred in gathering its witnesses for the trial; also the necessity for disposing of the case before assessment work had to be done (Tr. 80-81). The court asked the appellants if they were agreeable to paying the appellee's expenses which would

result from the delay but the appellants refused to make such payment (Tr. 136, 158). If the other appellants had any faith in Mr. Pape and his testimony, they should have been willing to pay these costs.

At the time of the trial the only evidence before the court as to when Mr. Pape would return to Seattle was the statement of his counsel that he would return in the latter part of January. There is no assurance or even any indication that if the court set the case for a later date after Mr. Pape's return, he would not sail again just as he had already done and ignore the trial date. As stated at 64 C.J. 59, the particular day of the term at which a trial will be had is within the discretion of the court, but here it was a case of delaying over a month and possibly over the term, with no indication that Mr. Pape would appear as a witness. His past action indicated he would not appear.

The court found his absence was willful, that he had not made any affidavit as to his absence, that he was a material witness, that his employment did not exempt him from appearing and due diligence had not been used to secure his attendance (Tr. 152, 153).

The granting or refusal of a continuance "rests in the discretion of the court to which the application is made". 12 Am. Jur. 450. See *Shea v. United States* 260 F. 807, Ninth Circuit, quoting the leading cases of *Isaacs v. United States,* 159 U.S. 487, 16 Sup. Ct. 51, and *Crumpton v. United States,* 138 U.S. 361, 11 Sup. Ct. 355.

In determining whether the court should grant a continuance, it had to consider the law on the subject of an absent witness who is also an absent party.

Mr. Pape was a party to the action and the motion for continuance was urged on his behalf. The rule stated at 17 C.J.S. 211 is that:

> ". . . it must appear that such absence is unavoidable and not due to the party's own negligence, that a postponement is not asked for the mere purpose of delay; and that, if the continuance is granted, there is a reasonable probability that the party will be able to attend the trial within a reasonable time, such as at the next term of court. . . ."
>
> "*Voluntary absence.* The purely voluntary absence of a party will not justify a continuance on his behalf. . . ." 17 C.J.S. 211.
>
> "*Absence from state.* Except as statutes may otherwise provide, the absence of a party from the state will not ordinarily be considered a sufficient ground for a continuance, unless some good excuse in addition is alleged as the reason for the nonappearance." 17 C.J.S. 212.

Appellants did not show Mr. Pape's absence to be unavoidable and the court found it to be willful. There was no showing that he would appear on any later date of trial and the evidence indicated he would refuse to appear unless compelled to do so.

From the standpoint of the other appellants, Mr. Pape was a witness and one with a personal interest in the matter. As stated at 17 C.J.S 223 it is an

abuse of discretion to deny a continuance because of the absence of a witness only if

> ". . . the application complies with every requirement of the law, is not made merely for delay, and the evidence is material and due diligence is shown".

The court correctly found the absence was to avoid being a witness and due diligence was not used. A further requirement as to an absent witness is "that the testimony can be obtained at a future time to which it is prayed that the trial be continued" (17 C.J.S. 224). There was no representation or evidence that Mr. Pape would ever testify for the appellants and the motion was simply for delay without any specification as to when defendants would be ready for trial.

When an absent witness is also an absent party a higher degree of diligence is required as stated at 17 C.J.S. 231-2:

> "It is generally held that a higher degree of diligence, a stronger case for a continuance on account of the absence of a witness must be shown if that witness is a party to the action, than would be required were he a third person, unless the case presents some peculiar feature from which some material injustice to the party's rights would result in case of trial without postponement. The rule stated in sec. 27 supra, that a party's own absence as a witness is usually not a good ground for a continuance, is especially applicable where the party has not informed his counsel of his whereabouts, where opportunity

has been had to take his deposition, or where he has voluntarily absented himself with full knowledge of the imminence of the trial. A party defendant is not entitled to a continuance in order to obtain the testimony of a codefendant unless proper diligence has been used to secure his presence or his deposition, and where, instead of taking steps to secure his testimony, he has relied on his codefendant's presence at the trial in the face of the fact that every circumstance pointed to his absence at the trial, a continuance should be denied. . . ."

More diligence is also required in seeking the presence of a nonresident. Mr. Pape resided in the State of Washington (Tr. 344) (17 C.J.S. 232).

What constitutes due diligence is for the trial court to determine.

"In general, it depends on whether the legal means for obtaining evidence have been employed to obtain the desired evidence, on the usual course of procedure and course of business, the situation or location of the absent witnesses or desired evidence, the facilities which may be employed to obtain it, and all the facts and circumstances of the case, as, for instance, the length of time applicant has had to procure the attendance of the witness or to obtain the evidence, and the care, or the absence of it, in making search or inquiry for the witness. . . ."

(17 C.J.S. 232.)

"Ordinarily, at least where there are also other circumstances justifying a denial, it is not error, or an abuse of discretion, to deny a continuance

where a witness is amenable to process and applicant has not caused a subpoena to be properly issued and delivered to the proper officer for service, with sufficient information to enable him to find the witness. . . ."

(17 C.J.S. 234.)

"It is not an abuse of discretion, or error, to deny a continuance where no effort has been made to secure the deposition of an absent witness in the manner provided by law, and no excuse is offered for failure to do so. . . ."

(17 C.J.S. 237.)

"... Thus, where no effort is made to secure the deposition until a few days, or even a month under certain circumstances, before the case is called for trial, there is no error in refusing a continuance. . . ."

(17 C.J.S. 238-9.)

Appellants may contend that the absence of Mr. Pape was a surprise and they were unable to get his deposition or to subpoena him. The affidavits show otherwise, but even if true the rule is that unavailing efforts just before trial are not enough. In *Armour & Co. v. Kollmeyer,* 16 L.R.A. N.S. 1110, 1112, the court held that efforts made from March 20, 1906 to May 7, 1906 and from April 29, 1907 to May 3, 1907 to ascertain the whereabouts of a witness was not enough to obtain a continuance where there was no evidence submitted that between May 7, 1906 and April 29, 1907 the defendant had made any effort to

find the witness, serve him with subpoena or take his deposition.

An application or motion for continuance should be made at the earliest practical time after knowledge of the necessity for a continuance is acquired (17 C.J.S. 256). The appellants should have made the motion for a continuance and filed the necessary affidavit of Mr. Pape immediately after October 4th. Mr. Pape was then in Seattle. It was the duty of the appellants, since they knew he would be absent, to ascertain when he would return and make their motion immediately.

Some courts hold that the setting of a case for trial will not be reviewed except upon a plain showing of a gross abuse of discretion. *State v. Kelley,* 21 A.L.R. 156, 27 N.M. 412, 202 P 524.

One cannot reasonably arrive at any conclusion except that Mr. Pape was telling Mr. Ward his true intentions of never appearing for trial while telling the other appellants he would be in the Far East. They had the mistaken opinion that if Mr. Pape actually was in the Far East on the trial date, they would be entitled to a continuance. They also had the mistaken opinion that they are under no obligation to use a deposition when they prefer personal attendance, although the latter was not available unless Mr. Pape would appear voluntarily. They also were uninformed of the necessity for showing, by affidavit of Mr. Page, when he would be available and his willingness to testify, as well as making their motion at the proper time. The court should not be ham-

pered, the administration of justice delayed and the appellee penalized because of appellants' erroneous assumptions and lack of knowledge of the rules and the law.

Appellants' brief states they did not know Mr. Pape would absent himself from the trial (P. 21). If that is true, how could they advise the court that Mr. Pape would be in Korea on December 14th (Tr. 137, 149; Appendix, Appellants' Brief 17, 18).

Appellants complain because the court denied the continuance in the face of the fact that counsel for appellants had repeatedly on October 4, October 7 and November 12 advised the court that Mr. Pape would be unavailable. Appellants should have taken heed from the statement of the court on October 4th when it said that if Mr. Pape was not available counsel could make the proper showing, or as he understood it, file a motion (Tr. 137, 149). Regardless of how the court said it, a motion with an affidavit or other documentary evidence is required (Rule 4, Appendix herein). The court cannot regulate its calendar by information submitted in such manner. If it could, it would repeal the rule. Appellee further contends these letters are not a part of the record in this case and should not be considered by this court.

The only authorities cited in appellants' brief which refer to their Point I, are two citations (P. 56) stating that arbitrary and capricious abuse of discretion is error. They apparently could find no comfort in the authorities as to the requirements for making the motion for continuance in a timely manner, support-

ing the same with affidavits of the proper persons, making a showing as to the willingness of the witness to testify, showing when he will be available, showing by the affidavit of the witness just what he would testify, a showing that due diligence had been unsuccessfully used to obtain the testimony of the witness and that he did not willfully absent himself. None of these tests were met as required by the authorities cited herein by appellee. Under these circumstances the decision of the court in denying the continuance was not arbitrary or capricious nor an abuse of discretion.

POINT 2.

THE COURT DID NOT ABUSE ITS DISCRETION IN GIVING CREDENCE TO GEORGE F. WARD'S AFFIDAVIT.

The affidavit of George F. Ward dated December 1, 1953, contains the following:

a. Recitals of statements by Mr. Pape to Mr. Ward as to Mr. Pape's refusal to be a witness for appellants.

b. Statements as to the whereabouts of Mr. Pape between the commencement of the action and the time of trial.

c. Statements as to the witnesses to be called by appellee and their availability.

Although the appellant Pape returned from Korea on January 7, 1954 (Tr. 110) and the motion for new trial was not argued until April 23, 1954, Mr. Pape has never denied that he was in and near Seattle,

Washington, as stated in Mr. Ward's affidavit, nor has any other proof been submitted to deny that he was so available in and near Seattle until November 26, 1953. Nor has anyone denied the statements made by Mr. Ward as to the witnesses for appellee and their availability. The only parts of Mr. Ward's affidavit which are in dispute, are the statements as to Mr. Pape's refusal to be a witness which Mr. Pape has denied (Tr. 110).

Although the court was very informative as to why it would not give a continuance, (Tr. 135, 136, 147, 152-155) there is nothing in the record or the court's opinion to indicate that its decision turned upon the part of Mr. Ward's affidavit which recites that Mr. Pape refused to be a witness. It is true that the court found the absence of Mr. Pape was intentional but there was plenty of evidence that he absented himself willfully, without relying on the statements claimed to have been made to Mr. Ward. Mr. Pape admits in his own affidavit that he sailed for Korea. He was not forced to go there. He knew this trial was set for three weeks hence. On January 13th Mr. Pape made an affidavit giving as his only excuse for going to Korea that it was part of his employment to do so and "That affiant had used up his leave time and was not able to apply for any further leave until the calendar year 1954". The most one can infer from the affidavit is that he would not have been paid wages for the period of time he was off the job for the trial of this case. Even this weak excuse was not before the court at the time the continuance was

denied. It was not made until after the trial as a basis for a new trial. As the court said at Tr. 702, the court decided the motion on the basis of the showing made at the time of commencing the trial. The record then and later showed his departure was voluntary, his absence was willful and there was no need for the court to place any reliance on the hearsay statements made by Mr. Ward.

As an indication of what the court had in mind when it denied the continuance, we have the court's statements:

> The Court. In this case I am convinced from reading the affidavits and motions and so on that Mr. Pape is a material witness, but I am not convinced that due diligence was used in obtaining his attendance, and I should like to hear—I suppose that one of the parties wishes to go on and the other one wishes it continued. Is that the situation?
>
> Mr. Robertson. Yes, your Honor.
>
> Mr. Banfield. We wish to go on.
>
> The Court. Well, as I say, I am convinced that he is a material witness, but I am in doubt whether diligence was used in securing his attendance. Now, if the parties should agree with that tentative conclusion, then it seems to me that the case should be continued but only upon the payment of accrued costs by the defendant. Is there objection to that?
>
> Mr. Robertson. I object to that, your Honor.
>
> The Court. Then I will hear argument as to whether or not due diligence was used in securing his attendance (Tr. 135-136).

The Court. Well, I overlooked the fact that he was a party (Tr. 147).

The Court. Well, I don't think we need to concern ourselves with a lot of these little details. The situation, as I see it, is this, that one of the defendants has willfully absented himself, and I don't know how the Court can continue the case where that appears. Now, don't you have reason to suspect that Pape's nonappearance here is willful?

Mr. Robertson. You mean willful in the sense that he is trying to deal with Mr. Ward?

The Court. No. That it is intentional.

Mr. Robertson: I don't think it is intentional that he is absent from the trial, your Honor.

The Court. Why isn't he here? He is a party and the case was set on October 2nd. He is a party. He isn't a mere witness.

Mr. Robertson. I know he is a party, your Honor. I think I have given every notice that he couldn't be. I don't understand this service of what he is in, your Honor. Apparently, it is some kind of contract service. I always supposed that he was some kind of enlisted man, but, apparently, it is some kind of civil service.

The Court. I don't know of any kind of employment that exempts a party from appearing if he wants his case tried. Now, at least there should be an affidavit from a party who claims that he cannot be at the time and place set for the trial of his case. There is no affidavit here from Pape, and it seems that there is about two months elapsed from the time the case was set until he sailed for Korea. The Court could never dispose of any litigation if a party were disposed to frustrate it by merely not appearing.

Mr. Robertson. Yes, your Honor; but after all there are two other defendants in this case with rights involved. You say because he is a party, but after all he is a material witness to the other two defendants. It certainly isn't our fault he is not here.

The Court. Has he been subpoenaed to appear here as a witness?

Mr. Robertson. There is no way to subpoena him your Honor.

The Court. When he was in Seattle—

Mr. Robertson. Well, I suppose I could have subpoenaed him in—

The Court. —if there was any reason to suspect that he was not in sympathy—

Mr. Robertson. I didn't have any reason at all. I said in my affidavit that in my conversations with him he never in anywise intimated that he had any such talks with Ward. He certainly never told me that at any time. I will admit that at the taking of the deposition he and Mr. Ward seemed to be quite friendly. They knew each other much better than Pape and I knew each other, but that is all I know about it.

The Court. Of course it is a wholly insufficient showing to show that a party is absent under the circumstances here disclosed.

Mr. Banfield. If the Court please, Mr. Vevelstad states here, "I personally urged him not to go on the voyage," but he refused to do it; and, then, if he said he was going, then why didn't they subpoena him if Mr. Vevelstad and Aurora Nickel Company want him here? When are they ever going to get him here?

The Court. The Court cannot tolerate that kind of, as I see it, willful nonappearance, and so

> the question now before the Court is whether the Court will continue the case upon assessment of costs or whether it should go ahead, and I am willing to hear from the parties on that (Tr. 152-154).

It is apparent from the record that the court denied the continuance because:

a. Due diligence had not been used to secure Mr. Pape's attendance at the trial.

b. No effort had been used to subpoena him for a deposition even though Mr. Vevelstad begged Mr. Pape to not go to Korea (Tr. 82).

c. Mr. Pape was a defendant and willfully absented himself from the trial without making any written statement as to why he would not be present, but by hearsay it appeared his only excuse was his employment.

The court did not have to give one bit of credence to Mr. Ward's affidavit to arrive at the conclusions expressed by the court. In fact the statements attributed to Mr. Pape by Mr. Ward regarding his refusal to be a witness, could not influence the court in any way in determining that due diligence had not been used. The other appellant's failure to subpoena him and his absence without a justifiable excuse were matters of undisputed fact. The most Mr. Ward's statements could do would be to give the real reason for the failure of the other appellants to subpoena Mr. Pape and for his intentional absence. If the court gave any consideration to these statements by Mr. Ward, they certainly were not controlling or persua-

sive in the court's decision. Even if the statements were false, and the court relied on them, they could not affect the decision.

But there is no reason to believe that these statements are false. The failure of one to pay his Bar Association dues and to be ineligible thereby to practice law, does not make the statements of such an attorney false. Even if Mr. Ward knew his dues were in default, and there is no evidence that he did, and even though he may have willfully deceived the court in his application to appear in the court below, the court can still use its discretion in believing, disbelieving or treating with suspicion the contents of the Ward affidavit. At the time the court denied the continuance it did not know Mr. Ward was in default of his dues, but that matter was brought to the court's attention before this same point was urged as grounds for a new trial (Tr. 107) and the new trial was denied. The court could have then given, and no doubt did give, such consideration to Mr. Ward's credibility as it deserved. It was a matter for the court's discretion at that time.

There is nothing in the record to indicate that the court placed any credence in the statements by Mr. Ward as has been assumed by appellants.

POINT 3.

DISREGARD OF APPELLANTS' REQUEST TO ADDUCE EVIDENCE OF MR. PAPE BEFORE DECISION WAS RENDERED.

Appellants did not at any time move the court to permit them to adduce the evidence of Mr. Pape after the trial of the case, unless the last paragraph of defendants' brief (R-95) can be considered a motion. Therein they request that if the court denies the relief demanded in defendant's pleadings, the case be reopened and defendants be given an opportunity to obtain the evidence. In accordance with Rule 7(b) F.R.C.P., such a request must be by motion in writing unless made during the trial or a hearing. No affidavit was submitted to support the informal request. Although Mr. Pape returned to Seattle on January 7, 1954 (Tr. 110) and made an affidavit of the fact on January 13, 1954 (Tr. 112) stating he was again leaving Seattle on January 20, 1954, and would be gone until March 20, 1954, no affidavit was filed in support of the request made in the brief until March 16, 1954. The court's opinion deciding the case was filed on March 9, 1954. If the court would consider such a request contained in a brief as a motion, it was then and when it made its decision, without any information as to when Mr. Pape would be available, or whether he was willing to be a witness, or would be subpoenaed or what he would testify if he did appear at some indefinite date. Under such circumstances it is not unreasonable that the court ignored such a request made in the brief and decided the case.

The cases in which it has been held that the trial court should reopen the case after argument for the purpose of receiving additional evidence, are cases involving some inadvertence, mistake, accident, peculiar circumstances, surprise or newly discovered evidence, or where unfair advantage has been taken by the other party. This request to take Mr. Pape's testimony after the trial is in an entirely different category. By Mr. Pape the appellants hoped to prove the location of their mining claims and the doing of the assessment work. Their whole defense depended upon his testimony. To rebut such testimony by Mr. Pape would require many witnesses. The appellee was prepared to present "approximately twenty persons" (Tr. 80) but when Mr. Pape sailed for Korea it was obvious that a lesser number would suffice to present appellee's case. The appellee presented only enough to make out a prima facie case (Tr. 155) which was seven witnesses. Several of these and many more would have been required to rebut the testimony of Mr. Pape if he had testified that he located the claims which appellants allege he located and had done the assessment work on them. The testimony of Mr. Pape would, with the rebuttal thereto, if it amounted to what defendants claim, have created a very sizeable addition to the record. This is quite different from reopening a case for some small bit of testimony.

The trial court should never reopen a case for further testimony except for good reasons and with a proper showing. An appellate court will interfere

only where there has been a clear abuse of discretion. 26 R.C.L. 1042; 64 C.J. 160. The court may properly refuse to reopen the case where the evidence sought to be introduced was within the knowledge of the party seeking the reopening and available to him at the trial. 64 C.J. 161. Appellants knew the necessity for having Mr. Pape's testimony and it was available to them by ordinary means—deposition and subpoena. Where there is newly discovered evidence not known to exist until after the trial, it is still within the court's discretion to reopen or grant a new trial but in this case the appellants knew where and how to get the evidence and that it was available. There is no abuse of discretion in refusing to reopen a case for the admission of . . . evidence . . . "which it does not appear that he could not have produced before the close of the case". 64 C.J. 163.

POINT 4.

APPELLANTS' CLAIM OF SUPRISE IN BEING REQUIRED TO GO TO TRIAL WITHOUT THE APPELLANT PAPE.

The appellants claim they were prejudically surprised in being required to go to trial without Mr. Pape. If they were prepared for trial under the belief that Mr. Pape would be present on the day set by the court and then found to their surprise that Mr. Pape had failed or refused to be present that would have been grounds for a continuance providing they had used due diligence to be informed of his intentions. It is quite a different thing, however, to

be surprised because the court refused to grant a continuance in the face of a finding, which is supported by the evidence, that a defendant deliberately absented himself and the other defendants did not use due diligence and the legal means to obtain his testimony.

The appellants should have known the court would properly apply the legal principles involved.

"Surprise" as a basis for any relief can be pleaded but must be without any fault on the part of the party urging such surprise. It is defined in equity practice in Black's Law Dictionary as:

> "The situation in which a party is placed without any default of his own, which will be injurious to his interests. Rawle v. Skipwith, 8 Mart. N.S. (La.) 407.
>
> "Anything which happens without the agency of fault of the party affected by it tending to disturb and confuse the judgment, or to mislead him, of which the opposite party takes an undue advantage, is in equity a surprise, and one species of fraud for which relief is granted . . ."

As grounds for a new trial, Black's Law Dictionary defines Surprise as:

> ". . . that situation in which a party is unexpectedly placed without default on his part, which will work injury to his interests . . .
>
> He must show himself to have been diligent in every state of the proceedings; Henderson v. Hazlett, 83 S.E. 907, 908; and that the event was one which ordinary prudence could not have

guarded against; 207 P. 328, 329; Rudin v. Luman, 199 P. 874, 877."

It certainly would not take much diligence on the part of appellants to anticipate that the court would not grant a continuance under these circumstances. Therefore they cannot plead surprise as a basic for either a continuance or review on appeal.

POINT 5.

CLAIM OF ERROR IN NOT ADMITTING MR. PAPE'S DEPOSITION IN EVIDENCE.

A thorough examination of the deposition shows that if the court had read and considered the deposition and given Mr. Pape's testimony full credit for being true, the court's decision in the case could not be affected thereby in any way. There is not one bit of testimony therein as to his staking any claims prior to the staking of claims by appellee. Mr. Pape testified that in 1953 (Tr. 396-7) he staked the Beach No. 4 claim (Tr. 403) and checked the lines of three Beach claims previously staked (Tr. 404). Whatever claims Mr. Flynn has which might conflict with Beach No. 4 were staked in the fall of 1952 (Tr. 100) and were prior to the location of Beach No. 4. The testimony is wholly insufficient anyhow to establish the location of a mining claim. This is the only testimony anywhere in the deposition concerning the location of mining claims.

The court based its opinion on the following with respect to the location of appellants:

1. Inadequate descriptions in the certificates of location as recorded, except as to the 3 Beach claims.

2. Insufficient evidence to show the claims were marked on the ground as required by law.

There is not one word in the deposition of Mr. Pape which touches on either subject. Appellee asked Mr. Pape questions as to when he was on the island, who he was with, conversations with others, the details of assessment work done and many other things of that nature, but he purposely avoided asking anything which could be used as proof of locations by appellants, knowing that Mr. Pape would never again appear as a witness.

The court was correct in stating the deposition was made for discovery purposes only, but it should have been objected to and not admitted because it was irrelevant and immaterial. If its exclusion was error, it was harmless error which should not be disturbed on appeal.

> "It is for the reviewing court to determine whether prejudice has resulted; and if such exclusion did not prejudice the prevailing party, and could not have affected the result, the error is harmless. The fact that the trial court may have excluded the evidence upon an objection that was not good in itself, or for an erroneous reason, affords no reason for disturbing the ruling; . . . 5 C.J.S. 1042-1048.
>
> "The exclusion of immaterial evidence is not ground for reversal, . . . 5 C.J.S. 1048.
>
> "Where evidence offered does not tend to prove any issue in the case, its exclusion, even for an

improper reason, is not prejudicial error." 5 C.J.S. 1049.

POINT 6.

CLAIM OF ERROR IN STRIKING AND NOT CONSIDERING TESTIMONY OF WITNESS RICHELSEN.

Mr. Richelsen attempted to identify the location of appellee's claims and the appellants' claims, so as to show the area of conflict, by drawing Exhibit K from information obtained from Aurora Nickel Company and its officers and from the original location notices filed by Mr. Pape in the Recorder's office (Tr. 448). The information obtained from defendants is obviously hearsay (Tr. 452, 453, 455). The witness was unable to plat the claims from the information in the location notices (Tr. 453, 459). Nevertheless, the court permitted Exhibit K to remain in evidence stating "the exhibit will be retained for whatever value it may have, but I doubt whether it will turn out that it will have any value." There is nothing in the opinion to indicate whether it was ever given any value.

Mr. Richelsen testified that he went on the claims to investigate some diamond drilling done by the government in 1942. He then testified as to the mineral content of the ore, the extent of it as developed by drilling and how it was more or less confined to certain areas. He admitted that he had no information on these matters except that gained from a government publication and conversation with the engineers for the government (Tr. 447). The court took

judicial notice of the publication; (Tr. 463) but after objection on the ground it was hearsay, stated it would not consider the testimony regarding the drilling and extent of the orebody (Tr. 447).

The only other testimony of the witness was in regard to plotting the discovery posts for the claims named Yakobi Nos. 1, 2, 11 and 12 so as to show in his opinion that there would be open ground between the claims. There was no objection or exclusion of this testimony (Tr. 444).

Since the court found the defendant's claims were not sufficiently marked on the ground or sufficiently described in the certificates of location, the exclusion of some of the testimony of Mr. Richelsen could not affect these issues as it did not touch upon them. If it was error to exclude the testimony it was harmless error.

POINT 7.

CLAIM OF ERROR IN HOLDING BOHEMIA BASIN CAMP WAS A NATURAL OBJECT OR PERMANENT MONUMENT.

Appellants' first argument is that Bohemia Basin Camp appears from the testimony to have been at the beach near the mouth of Bohemia Creek and not as the court found, in the valley and to consist of the cabin. This argument was not made a point on appeal (Tr. 717-720). If they had made it a point on appeal, they could not prevail because there is plenty of evidence that this cabin, and its surrounding buildings are known as Bohemia Basin Camp. See testimony

of Mr. Norppa (Tr. 246), Mr. Goodwin who flatly stated it was known as Bohemia Basin Camp (Tr. 575) and Flynn (Tr. 320, Appellants' Brief p. 49). Norppa identified it on the map Appellee's Ex. 1 (Tr. 246) with a blue pencil. Even though some other witnesses, some of whom had never been off the beach, had a different idea of where Bohemia Basin Camp was located, there was plenty of testimony to support the finding expressed in the opinion.

Appellants' next argument is that since the cabin was only occupied temporarily, it is not a "camp", and since it was not a camp, the court erred in holding that the cabin is the Bohemia Basin Camp referred to in the certificates of location recorded by appellee. As stated above, this has not been designated a point on appeal. Appellants do not cite any authorities for the requirement that a place must be continuously inhabited to be a camp. The dictionary definitions imply that a camp is a place of temporary occupation.

> CAMP —The ground or spot on which tents, huts, etc., are erected for shelter — as for an army. A single tent, cabin or the like used on a vacation or outing. (Webster's New Collegiate Dictionary, 1945.)

Appellants argue that the U. S. Coast & Geodetic Survey Chart No. 8260 shows "Bohemia Basin" marked on the chart a short distance inland from the mouth of the creek, implying that the upper end of the valley is not part of Bohemia Basin. Such charts are made for mariners and the markings are placed

so as to name what the mariner sees from the water. A mariner sees the mouth of the creek and the lower part of the valley. The chart has only mountain peaks and beach line details as mariners are not interested in the bottoms of inland valleys. If the words "Bohemia Basin" were placed farther inland, the mariner would not be sure of what valley came down to the beach at this point.

Since appellants have not argued their point as to whether Bohemia Basin Camp is a natural object or a permanent monument, we refrain from such argument except to quote and cite:

> "The terms 'natural object' or 'permanent monument' . . . may include trees blazed and squared, . . . a rock monument, a prospect hole, . . . a permanent post or stake firmly implanted in the ground, a cabin, a dam, a mill or a known mining claim" 58 C. J. S. 105-106.
>
> *Steel v. Prebble,* 77 Pac. 2d 418.

POINTS 8 AND 9.

CLAIM OF ERROR IN NOT GRANTING NEW TRIAL.

Appellants contend they were entitled to a new trial on the basis of the denial by Mr. Pape in his affidavit filed March 26, 1954 of the statements attributed to him by Mr. Ward in his affidavit to the effect that he would never be a witness for appellants. As pointed out herein on the discussion of Point 2, there is plenty of other evidence to sustain the court's finding that Mr. Pape absented himself willfully. In considering whether a new trial should be granted, the court could very well refuse it on the grounds that

even if Mr. Pape had made no such statements to Mr. Ward, it would still refuse the new trial because the other evidence shows it was willful. For instance, the court specifically held that the employment of a party is no excuse for his absence (Tr. 153). The main objection to granting the continuance was that due diligence had not been used to obtain his testimony. There is nothing in the affidavit of Mr. Pape which would overcome that objection (Tr. 109-112). Another objection was that appellants refused to advance appellee's cost of appearing for trial (Tr. 136, 158). Nothing in Mr. Pape's affidavit can overcome their refusal to pay these costs nor was there any offer to pay the extra costs of a new trial. As stated under Point 2 *ante,* whether Mr. Pape had actually told Mr. Ward he would not be a witness, was entirely immaterial to the issues on which the court decided to deny the continuance except it may have contributed to its decision on the one point of willful absence. It could have no influence in deciding to deny the continuance on the other grounds.

The other evidence presented by the affidavits of Messrs. Pape, Brown and Breseman are all for the purpose of disputing some minor and immaterial portions of the evidence, except that they indicate that the witnesses would present some evidence of prior locations by Mr. Pape. If this evidence could result in a preponderance of the evidence to overcome the two findings of the court, namely:

(a) Inadequate descriptions in the certificates of location recorded by appellants, except as to the 3 Beach Claims; and

(b) Insufficient evidence to show the claims were marked on the ground as required by law.

then, and only then, should the trial court grant a new trial.

No testimony of these men can change the descriptions in the location certificates recorded by Mr. Pape (Appellants' Exs. E and I, Appendix Appellants' Brief 27-77); or the fact that "an intelligent person, with a knowledge of the permanent natural objects and permanent monuments in the vicinity seeking to locate the claims by means of the certificates and marks on the ground, could not identify them" (Opinion, Tr. 103). If it was error to deny a new trial, it was harmless error because no new trial could change the location certificates.

Anything which Mr. Pape did to stake the mining claims for appellants in 1950 and 1952 would still show on the ground. Appellants could have shown by the witness Harold Jones who did assessment work on the property in 1952 (Tr. 463-472), with Messrs. Pape, Larson and Besel, or the witnesses Harold Hofstad and Arthur Hofstad who with Bill Walker and John Breseman (Tr. 473-477) did assessment work in 1953 on the claims, just what they saw as evidence of claims having been staked by Mr. Pape in 1950 and 1952. They could hardly spend weeks on the claims without seeing whether posts had been set, blazed and marked as required by law, whether the claims had boundary lines marked on the ground and discovery notices posted. These four witnesses and four other persons could have been used for this pur-

pose. Instead the testimony was confined to statements by Hofstad that he helped amend location notices and readjust and repair monuments (Tr. 486, 487), statements by Arthur Hofstad that he helped post amended certificates (Tr. 502), repaired a few monuments (Tr. 504) and did some blazing in 1953 (Tr 510), and statements by Edward Engdahl that in June, 1950 (before the claims were open to location) he had blazed old claim lines and corner posts, put up monuments but staked no claims (Tr. 516-518) but in 1953 they staked a claim on the beach (Tr. 520). These witnesses may not have been able to testify as to the number and identity of the claims but they at least could have been asked by appellants as to whether it appeared to them that the claims were properly staked with all the corner posts, boundaries marked and notices posted. This appears to have been studiously avoided. Harold Jones did not even mention any evidence of prior locations.

Mr. Vevelstad was on the claims in 1953 (Tr. 525). He testified that Mr. Pape's location notices were posted (Tr. 526, 527), he amended locations (Tr. 535), testified as to the exact location of appellants' claims (Tr. 537), and saw Mr. Pape's discoveries made in 1950 (Tr. 564). In spite of all his knowledge of the Pape locations he did not say one word about there being any corner posts or side or end lines brushed out, blazed or otherwise marked on the ground.

The complaint in this case was filed on June 23, 1953. The appellants had plenty of time before the trial in December to make a thorough examination of

the claims which they say Mr. Pape staked and to survey, map and make notes on the adequacy of his markings on the ground and other requirements. They did not need Mr. Pape to show them the claims if they were adequately marked on the ground. Mr. Pape could add nothing to the marks by his presence in court, but without him they could have proved by others exactly what Mr. Pape had done in 1950 and 1952, in the same way the appellee proved by the witnesses Johnson, Klein and Harrigan the extent to which Pape had staked claims, and the extent to which he failed to meet the requirements.

> "Where the unsuccessful party might, with reasonable diligence, have produced other testimony at the trial of the same character and to the same point as that alleged to have been newly discovered, a new trial should be refused." 66 CJS 294.

The absence of Mr. Pape during the trial and his subsequent statement by affidavit that he located some claims, does not make his testimony newly discovered. It was always known by appellants that if they had any claims at all, it was through Mr. Pape's locations.

> "Moreover, facts are not newly discovered because the witness who could have testified thereto is temporarily unavailable, where movant failed to subpoena such witness." 66 CJS 297.

The testimony of Mr. Pape, Mr. Breseman and Mr. Brown was available and known to appellants because Mr. Pape was in Seattle for over seven weeks after this case was set for trial. He could have been subpoenaed for a deposition or he could have been in-

terrogated by the other appellants at the time his deposition was taken by appellee on September 10, 1953 (Tr. 344). The part played by both Brown and Breseman had been detailed in the deposition of Mr. Pape (Tr. 354, 363, 375, 426, 427). Appellants were then aware that they had information and if appellants did not investigate and determine before the trial whether they wanted to use these witnesses, they could not wait until after the trial and ask for a new trial to present their testimony.

> "No matter how material the testimony may be, an applicant for a new trial on the ground of newly discovered evidence must have used ordinary diligence to discover and produce the evidence at the trial." 66 CJS 298.
>
> "Ordinarily a new trial will not be granted for newly discovered evidence which might have been discovered before the trial by diligently making proper search or inquiry, as of a coparty, . . . or of an agent . . . or co-partner." 66 CJS 304-5.

The court was called on to consider whether the testimony of these witnesses even if much more extensive and detailed than was set forth in their affidavits could possibly change the findings of the court. It is obvious that they could not overcome the lack of sufficient descriptions in the location certificates, especially since the laws of Alaska provide:

> "Any attempted location of a mining claim that does not fully comply with the provisions of this act shall be null and void." Sec. 47-3-30 Alaska Compiled Laws Annotated 1949. Appendix, Appellants' Brief pp. 6-7.

Whether they could establish sufficient markings on the ground was a matter for determination by the court below, and whether the new evidence would require a different decision is the test. 66 CJS 312. The court may exercise considerable discretion in granting or denying a new trial. 66 CJS 484. It certainly had plenty of reasons to sustain its denial of a new trial. It was not an abuse of discretion to do so.

POINT 10.

CLAIM OF ERROR BECAUSE NO JUDGMENT WAS ENTERED ON APPELLANTS' COUNTERCLAIM.

Appellants filed a "Fourth Defense and Counterclaim" for $5,000,000.00 damages for loss of profits and $15,000,000.00 exemplary damages. No reply was filed by appellee.

Rule 7(a) FRCP requires a reply to be filed to "a counter-claim denominated as such." It also prohibits a reply to a defense contained in an answer except when the court orders a reply to be filed to an answer. If it is a defense, appellee was prohibited from filing a reply, if it is a counter-claim, appellee was required to file a reply or admit the contents thereof (Rule 8(d) FRCP), unless, as in this case, it can be said that it was not "denominated as such." A search of the decisions and texts on Rules 7(a) and 8(d) fail to reveal any such circumstance having been reported. Whether a plaintiff is required to file a reply to a hybrid such as this which is denominated both as an

affirmative defense and as a reply seems to be a matter of first impression. It may not be necessary however to rule on this point. If the court finds for appellee on any one of the other arguments on this point, supra, it can avoid deciding the question.

Appellee in his amended complaint alleges his performance of each of the steps necessary to stake his claims in Alaska. He then alleges that appellants claim some interest in the area covered by his claims by reason of purported conflicting prior locations which cannot be identified or located on the ground and which are alleged by appellee to be invalid (Tr. 60) and create a cloud on appellee's title. Appellants answer denying the material allegations in their "Second Defense" and setting up a "Third Defense" (Tr. 68) in which they allege their ownership of certain prior locations and compliance with each of the requirements of law for making such locations and keeping them in good standing. They then allege in the "Third Defense" that appellee's claims were located after appellants located their claims, that they are invalid, and they specifically allege a failure by appellee to comply with each of the requirements of the mining laws on making locations. They then allege that appellee's claims constitute a cloud on appellants' titles.

Under Rule 8(d) FRCP, this "Third Defense" and each allegation therein is "taken as denied or avoided." Appellants then set forth their "Fourth Defense and Counterclaim" which consists of three parts. The first is an incorporation of the "Third

Defense" by reference. This part is already "taken as denied or avoided."

Appellee should not be required to deny an allegation which by the rules is already denied or avoided. The validity of the two sets of claims is here put in issue and no judgment can be entered except on a finding by the court on those issues. The court found them for the appellee.

The second part is an allegation that while appellants were in possession, appellee located claims blanketing the area "by pretended locations of 102 pretended mining claims, mentioned in plaintiff's (appellee's) amended complaint" (Tr. 74) and caused notices to be recorded, thus preventing appellants from mining the claims or selling them, and preventing the minerals therefrom from reaching the markets of the world to compete with other minerals. Appellee had specifically alleged in his amended complaint that he was in possession of the land he located at the time of location and thereafter (Tr. 59, 60). Appellee had alleged in his amended complaint his full compliance with each requirement of the law for staking mining claims, which constitutes a denial of appellants' allegation that appellee's claims are "pretended mining claims" (Tr. 74). Since the questions of who was in possession and whether appellee's claims were pretended or real mining locations were put in issue, the court could not enter a judgment on the counterclaim, even if it is considered to be denominated as such, because of a failure to again put at issue what is already at issue.

Then appellants allege that the location notices of appellee were recorded. This is alleged in the complaint and it can do no harm to appellee to have it admitted. The next allegation therein is that appellee's locations prevented appellants from mining or selling their claims and prevented the minerals from reaching the market to compete with minerals mined elsewhere. The purpose is immaterial and the admission of such an allegation, by itself, does not entitle the appellants to a judgment.

The third part of the "Fourth Defense and Counterclaim" is an allegation of the amount of damages which under Rule 8(d) FRCP is not admitted by failure to file a responsive pleading where one is required. The court could not enter judgment on the counterclaim without proof of damages and the proof is wholly inadequate to sustain a judgment.

The only testimony on damages is that given by the appellant Vevelstad who stated the National Production Authority was "going to finance all the property" but declined because of Mr. Flynn locating his claims (Tr. 545-546). He calculated the $5,000,000 loss of profits by stating that it was the same sum undesignated persons had threatened to sue for from the Howe Sound Company. In other words since somebody else had threatened to sue for $5,000,000 on unspecified claims, Vevelstad said "so I used the same figures" (Tr. 546). Later (Tr. 547) he testified "Well, I just took a figure. There is nothing definite, you know, because, if you had the plant operating, the plant would earn annually sixty million dollars" (Tr. 549).

The whole claim for damages is so nebulous and fantastic that the damages claimed could not even be described as speculative.

His claim of being financed by the National Production Authority and his counsel's reference to the term "National Certificate of Authority" are without any basis whatsoever.

The National Production Authority was created by the Secretary of Commerce (F. R. Doc. 50-8068, filed Sept. 13, 1950, 15 F. R. 6182) to carry out the provisions of the Defense Production Act of 1950 (Sept. 8, 1950, c. 932, Sec. 1, 64 Stat. 798) which were delegated to the Secretary of Commerce by Executive Order 10, 161 (Sept. 12, 1950, 15 F. R. 6105). The National Production Authority had no authority delegated to it to make loans to anyone. The Secretary of Commerce had no authority to do so and therefore could not delegate such authority. The power to make loans was delegated under Executive Order 10,161, ante, to the Reconstruction Finance Corporation by Sec. 303, Part III thereof, and then only upon certification as to necessity by the Secretary of the Interior as to metals and minerals. The same section conferred authority on the General Services Administration to purchase and stockpile metals and minerals.

Regardless of whether the allegations of the "Fourth Defense and Counterclaim" are deemed admitted or denied, no judgment can be based on such meager testimony of damages which is mere guesswork. No evidence was submitted as to the quantity or quality of the ore, the cost of extraction, the value

of it on the market and the resultant profit, or what the appellants could sell their interest for.

> "However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some date from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered; and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in actions of tort." See 25 C.J.S. 496.

The court below took the view that the allegations of the "Fourth Defense and Counterclaim" as to failure of appellee to comply with the provisions of the law in staking his claims, were "merely denials in affirmative form of the allegations of the complaint." Also that "Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under Rules 7(a) and 8(d) FRCP."

Under Rule 8(f) all pleadings must be construed so as to do substantial justice. That is the way the court below construed the pleadings.

If, as the court below has said, the appellee cannot be forced to repeat in negative form the allegations

of its complaint, or deny what is already denied under the "Third Defense" and the rules, then the whole of the counterclaim was already at issue except for the extent of the damages which Rule 8(d) puts in issue.

POINT 11.

WHETHER APPELLEE'S CLAIMS WERE LOCATED AND CERTIFICATES OF LOCATION FILED ACCORDING TO LAW.

Appellants have called attention to many irrelevant and immaterial facts in support of their contention that appellee did not properly locate and record notice of his claims. Appellee herein replies to each of appellants' material statements.

It is true that appellee did not testify as to whether the content of the minerals in the rock at the points of discovery would justify a reasonable man to mine it. The test is not whether the ore is rich enough to mine but is whether it is rich enough to justify further prospecting and development.

McShane v. Kenkle, 44 P. 979;
Cameron v. U. S., 252 U.S. 450, 40 Sup.Ct. 410.

Whether the ore found was rich enough to justify further expenditure toward making a mine is a question of fact to be determined by the court from all the evidence and need not be determined from opinions expressed by a witness.

Columbia C. Min. Co. v. Duchess etc. Co., 79 P. 385.

The court could reach such a conclusion from the contents of the Department of Interior report of in-

vestigation of "Yakobi Island Nickel Deposit" No. 14182 which was identified and brought to the court's attention (Tr. 277), Sitka Quadrangle (DD-8), which is a geological map of which the court said it would take judicial notice (Tr. 279), and the testimony of Mr. Flynn as to the mineral content of the rock in place (Tr. 270-272, 281, 282, 289-290). The court specifically found the testimony of Mr. Flynn to be sufficient to "support the finding of a valid discovery" (Tr. 106).

Appellants state that Mr. Flynn testified (at Tr. 281) that his discovery stakes and notices were on end lines of his claims. An examination of the testimony shows his counsel asked him if mineralization showed at each of the "end lines between the various claims upon which your discovery posts are located and your discovery notices posted." The witness answered that such mineralization appeared all "along the line there and particularly at the places where I put in the posts." The witness proceeded to answer the question as to mineralization without confirming or denying that all his claims had discoveries at the end lines. It is obvious that the implication raised by the form of his counsel's question was not true, especially in view of Mr. Flynn's testimony elsewhere to the effect that most of his discoveries were near an end line but some were not and a separate post was put up for the discovery in every case (Tr. 228, 271, 272, 281, 282, 291, 292, 294, 295, 301-307, 313). Any inference by appellants that there was not a separate discovery for each claim is completely dispelled by the record.

Appellants devote considerable space to pointing out that appellee's location certificates and notices all state that the claims run 1500 feet in one direction from the discovery monument, whereas the record at the places cited in the preceding paragraph shows that the discoveries were generally near an end line common to two claims (called a center end line as distinguished from a center line of a claim) from which Mr. Flynn would walk in each direction along the center lines to find a discovery if one was not within the claim near the end line. The testimony shows he and Norppa made their plans at night as to what they would do the next day and made out their notices for the claims they sketched on a contour map (Tr. 233, 277, 285). Mr. Flynn expected to be able to, and in almost all cases did, find a discovery near the end line. Not knowing in advance how far away from the end line it would be, he made all the notices so the claim would be described as running 1500 feet in one direction from the discovery which would be near an end line. No person could be deceived by this inaccuracy. The center, side and end lines were marked on the ground; posts were erected at each corner, the discovery and both ends of the center lines; the discovery posts, the posts at each end of the center line, and each corner post were marked to show which posts they were (Tr. 217-225, 231, 240, 252-253, 283-285, 288, 291-294, 298). One might be inconvenienced on a few claims if he took copies of the location certificates and tried to find the discovery posts but on only 5 claims are the discovery posts more than 30 feet and

less than 70 feet from the place stated in the notice and on only one claim is the discovery more than 70 feet from the place stated (Tr. 22, 23). Appellants claim the locations are void because of such inaccuracy.

As stated in Morrison's Mining Rights, 16th Ed., p. 59, "as the result of carelessness, accident or defective instruments, variations between the courses called for in the record and the monuments on the ground are matters of constant occurrence. The general rule in such cases is that the monuments control."

Culacott v. Cash G. & S. Min. Co., 6 Pac. 211;
Book v. Justice Mining Co., 58 F. 106;
Treadwell v. Marrs, 83 P. 350;
J. E. Riley Inv. Co. v. Sakow, 9th Cir., 98 F. 2d 8.

> "As a general rule a mining location is not rendered invalid by a mere variation or discrepancy between the boundaries of a claim as marked on the ground and the courses and distances described in the location notice or certificate." 58 CJS 106.
>
> "In the absence of fraud in such a case the locator may claim accordingly." 58 CJS 106-7.

This rule of construction is specifically provided in the rules for construing the description of a conveyance of real property in Alaska. 58-7-3 Alaska Compiled Laws Annotated 1949. There is no evidence of fraud in such inaccuracies and the record supports the trial court's finding that appellee marked his claims on the ground as required by law.

> "As a general rule, a substantial compliance in good faith with the requirements of the statute or regulation in the matter of posting notice is required and is sufficient . . .,
>
> . . . if by any reasonable construction of the language employed it imports notice to subsequent locators that the ground upon which it is posted is claimed by another and the extent thereof, it is sufficient."
>
> "In determining the sufficiency of the contents of the notice it should be liberally construed with the view to protect the miner in the enjoyment of his rights. . . ." 58 CJS 97.

Appellants claim appellee's location notices (Exhibits 2, 3 and 4) do not state "the width on each side of the center of such lode or vein," but instead stated they include "300 feet of surface ground on each side of the center line of said claim." This is indeed a most trifling variation from the statute, especially when each notice is taken as a whole. Each notice states "the undersigned . . . has . . . discovered, located and claimed 1500 linear feet horizontal measurement of, on and along the lode or vein with 300 feet of surface ground on each side of the center line of said claim," and also "This claim extends 1500 feet from the discovery monument on which this notice is posted, along the course of said center line of said claim." Taken together these portions of the notice state the ground located runs 1500 feet along the "lode or vein" and 1500 feet along the "center line of said claim" which makes the two identical. It also states that the locator claims "300 feet of surface ground

on each side of the center line of said claim" which, when construed with the rest of the notice, shows the claim extends 300 feet on each side of the "lode or vein" as required by the statute. In any event, there is no evidence of any fraud, there has been a substantial compliance, the notice was adequate warning of what was claimed when taken with the markings on the ground and the notice would not be invalidated by such a trifling mistake. If it were invalidated, it is doubtful if any location notice in Alaska is valid even though printed on a form as are these by a printing company.

Appellants, without arguing the point, state the descriptions in the notices are not tied in to a natural object or permanent monument, although they are all tied to Bohemia Basin Camp. This is discussed by appellee under Point 7.

Appellants contend that if the location certificates are sufficient, even though the claims do not extend exactly 1500 feet in one direction from the discovery stake, then there must be open ground between the claims of appellee. If so, there is nothing to stop appellants from validly locating such ground and such fractions are not in dispute. This assumption of appellants is founded on a belief that in one way or another, the appellee should be bound by, and the location of his claims determined by the inaccuracy in the descriptions instead of by the stakes and boundaries marked on the ground. He cites no authority for such a proposition.

POINT 12.

PAPE'S PROOFS OF LABOR BEING PRIMA FACIE EVIDENCE OF THE PERFORMANCE OF ANNUAL LABOR.

Whether or not the proofs of labor recorded by appellants are prima facie evidence of the work therein claimed to have been done is of no importance, because the performance of annual labor does not create any rights in claims which have not been located according to law. The court found appellants' claims were not adequately marked on the ground nor sufficiently described in the recorded notices. However, the court did not hold the proofs of labor were not prima facie evidence of the work done. It decided that the work done was performed outside the claims for the benefit of non-contiguous claims and under such circumstances the burden of proof to show that such work benefits the claims, is on the one making the claim. "This burden was not sustained by the defendants." (Opinion, Tr. 104 and citing authorities.)

POINT 13.

FAILURE OF APPELLEE TO FILE A REPLY BRIEF TO APPELLANTS' TRIAL BRIEF.

Appellants' claim that the failure of appellee to file a reply brief to the trial brief of appellants constitutes a waiver and admission of appellants' "argument on those affirmative issues and charges" set forth in appellants' Third Defense and Counterclaim; although they admit they have no authority for such a contention. Since the appellee did not

designate any part of the contents of the record on appeal and appellants excluded the trial briefs from the record except portions printed at Tr. 93-95, which are not germane to the argument on this point, the other portions of the trial briefs are not part of the record. This fact precludes any argument on their contents. Appellants' point 13 cannot be considered under such circumstances.

If there is any merit to such a fanciful argument, it is not applicable in this case because appellants have no basis for any award of damages or judgment quieting title in appellants, for the simple reason that they did not prove the ownership of a single valid mining claim. Having no title they could suffer no damages. Appellee simply refrained from wasting his counsel's time and the court's time by replying to arguments, the replies to which were evident to the court without any reply brief.

POINT 14.

APPELLANTS' CLAIM THAT THE BURDEN OF PROOF WAS PLACED UPON THE APPELLANTS.

Appellants contend that since the trial court in its opinion first set forth its reasons for holding the appellants' claims to be invalid and then its reasons for holding the appellee's claims to be valid, the court "erroneously either cast the burden upon appellants or thought they were the plaintiffs". Appellants admit that the order in which the points are set forth in an opinion does not affect the result (Appellants' brief

p. 79). Appellee can see no point in making such an argument if it does not affect the result, and submit that the arrangement of the portions of an opinion is no indication of where the court places the burden of proof.

Appellee admits the burden of proof was on him to prove the title to his mineral claims. This he did by first proving the performance of all the acts necessary to locate, stake and record notice of the claims according to law by the testimony of Flynn, Norppa and Johnson with his surveys, as cited with references to the pertinent portions of the record, in appellee's Answer to Statement of the Case, ante. Appellee also proved by the witnesses Flynn, Johnson, Harrigan and Klein (Tr. 253, 254, 262, 295, 657-663, 665, 669, 682-683) that the ground was open to location when he staked it, with no evidence of any prior locations except the notice on the Nina claim which is not involved in this case. No other allegations of the complaint had to be proved by appellee because those contained in Paragraphs VI and VII of the amended complaint (Tr. 60) alleging a conflict in area with the purported claims of appellants, their claims to such conflicting areas and the cloud on the title created thereby were all admitted in appellants' answer (Tr. 68) and affirmatively alleged in the Third Defense.

At this point in the trial appellee had made out a prima facie case, and if appellants had not gone forward with their evidence, appellee would have been entitled to a decree.

> "When plaintiff has made out a prima facie case the burden of going forward with the evidence

will be shifted to defendant; and it is necessary only for plaintiff to make out a prima facie case in order to put defendant on his proof, but the burden of proof which rests upon plaintiff when the allegations of the petition are denied does not shift." 74 CJS 122.

"The courts frequently do say that when plaintiff in an action to quiet title has made out a prima facie case the burden of proof shifts to defendant. The difficulty arises because the words 'burden of proof' are used in two senses; one to indicate the burden which rests upon the plaintiff when the allegations of the petition are denied, and the other to indicate the duty to meet and rebut some evidence introduced by the adverse party by proof to overbear it in the mind of the tribunal. The burden of proof in the former case does not shift. The duty of going forward with the evidence may shift from time to time." (*Lake Front East Fifty-Fifth Street Corp. v. City of Cleveland,* 7 Ohio Supp. 17, 19, affirmed, App. 36 NE 2d 196, appeal dismissed 38 NE 2d 410, 139 Ohio St. 410.)

There is nothing in the court's opinion from which it can be inferred that the court did not thoroughly understand the burden of proof was on appellee as plaintiff and the duty on appellants as defendants was to go forward with their evidence and try to overcome the prima facie case made by appellee. Nothing more was required of appellants.

Moreover appellants were seeking affirmative relief and a decree quieting title in them as to their own claims, which puts them in the same position as ap-

pellee with the same burden but only as to their own claims. The court had to decide their petition too.

Appellants complain that appellee did not prove the extent of the conflict between the two groups of claims. The proof shows that appellee knew where his claims were because he located them and had surveyed them but it was absolutely impossible to tell where the appellants' purported claims were located. It is apparent appellants did not themselves know where their purported claims were located. Even the descriptions in their location certificates were so erroneous that the court found from the evidence of Mr. Richelsen (Tr. 448-459) that the descriptions were inadequate "to enable any person to ascertain the situs of the claims" (Tr. 101). Descriptions in notices are of course only general and to determine the actual extent of conflict one must survey the boundaries of the claims as marked on the ground. As pointed out above, there was no evidence on the ground of the locations claimed to have been made by Mr. Pape in 1950 and 1952 until the summer of 1953 after appellee had located his claims, when appellants started to amend their purported locations and made a few marks on posts as shown by the testimony of the witnesses Johnson and Klein (Tr. 614, 683-685), which were surveyed and platted as Exhibit 6 and made into a transparency as Exhibit 7 showing all posts, monuments, blazes, boundary markings and other evidence of appellants' purported locations (Tr. 578-580). The impossibility of showing the extent of the conflict is apparent from the fact that appellee's claims only

existed on paper and the few posts etc. erected in 1953 did not even make out a pattern of a single complete claim.

The extent of the conflict is immaterial when the evidence discloses as it does here that the appellants had no mineral locations.

POINT 15.

NECESSITY FOR APPELLEE TO RELY UPON THE STRENGTH OF HIS OWN TITLE.

Appellee did rely on the strength of his own title and proved all the allegations of the complaint which were not admitted by appellants in their answer, and affirmatively alleged by them in their Third Defense. In the second paragraph under Point 14 of this brief appellee has set forth the citations to the testimony and named the witnesses who proved the full compliance of appellee with the laws on locating and recording mining claims and the fact that the ground was open to location when appellee made his locations. That proof coupled with the admissions of appellants by their pleadings proved the strength of appellee's title and was found by the court to be sufficient. Appellants seem to be arguing that appellee failed to prove that the claims of appellants were invalid. They simply ignore appellee's proof by four witnesses that there was no evidence of any locations in 1950 or 1952 or any other time prior to the locations made by appellee in the fall of 1952. Nor was this testimony all on rebuttal as stated by appellants in their brief (p.

81) because the witnesses Norppa and Flynn both testified in appellee's case in chief to there being no evidence of recent locations when they staked appellee's claims (Tr. 253, 254, 262, 295).

POINT 16.

REQUIREMENT THAT APPELLEE PROVE ON HIS CASE IN CHIEF THE EXTENT OF CONFLICT BETWEEN THE CLAIMS OF THE PARTIES.

We agree with appellants that a plaintiff in a suit to quiet title must prove that his rights have been interfered with, that defendants' claims are invalid and constitute a cloud on plaintiff's title, unless such allegations are admitted by the defendants. Appellee alleged these facts (Tr. 60) in his amended complaint. Appellants admitted in their answer that they claimed title and possession to so much of the area embraced within appellee's claims as was embraced with appellants' purported claims (Tr. 68); allege that they recorded the notices of their claims (Tr. 70); allege that the appellee's claims constitute a cloud upon the title to appellants' claims (Tr. 73) to the extent of the conflict between them, but failed to identify where their claims were located. The appellee could not survey appellants' claims because they simply did not exist and there was nothing to survey until appellants started to amend their locations in 1953 and make some marks which could be surveyed and platted as Exhibits 6 and 7. The whole case was tried with both parties taking the position that a conflict existed but

its extent was unknown. Appellants' certificates of location were of record at Sitka, Alaska, as appears by their own allegations (Tr. 70) thus creating a cloud on the title which is an interference with the rights of appellee. Appellants claim proof of a conflict in areas had to be made by appellee on his case in chief. Appellants made a motion for dismissal at the close of the appellee's case in chief (Tr. 326) but made the motion only on the grounds that appellee was not a citizen and that the location certificates did not tie the claims into a natural object or permanent monument. They did not question the adequacy of the proof as to the extent of the conflict. During the remainder of the trial the conflict was first identified by the witness Richelsen (Tr. 439, 440) who prepared Exhibit K which was introduced (Tr. 441) by appellants as an exhibit to show the extent of the conflict. If appellee did not establish the extent of the conflict, appellants did it for appellee as well as it could be done under the circumstances.

POINT 17.

CLAIM THAT APPELLEE DISQUALIFIED HIMSELF TO LOCATE MINING CLAIMS IN ALASKA WHEN HE VOLUNTARILY STATED HE WAS A CANADIAN CITIZEN.

Appellants do not pretend to quarrel with the decision in *McKinley Creek Mining Company v. Alaska United M. Co.*, 183 U. S. 563, 571, which holds that although the mining laws limit locations to those made by citizens of the United States (41 Stat. 437; 30 USC

Sec. 22) such locations by aliens are voidable, not void, and are free from attack by anyone except the government. They claim however that even though appellants cannot attack such locations, the decision in *McKinley Creek v. Alaska United* does not relieve the appellee of the burden of proving he is a citizen, since he located the claims and is asserting a right to have title quieted rather than being in the position of having the validity of his claims attacked. As stated by appellants in response to an inquiry by the court, "it depends upon the position of the party."

In *McKinley Creek v. Alaska United* the judgment quieted title to two claims in Alaska in favor of the plaintiffs (appellees) against the defendants (appellants) as in the instant case. There the defendants had raised the issue of the citizenship of the plaintiffs and plaintiffs had offered no proof of their citizenship making it necessary for plaintiffs to sustain their claims as aliens the same as the plaintiff-appellee herein. The court held that the location of a mining claim "when perfected has the effect of a grant by the United States of the right of present and exclusive possession" and that grantees of the public land take by purchase. The court then quoted with approval from *Doe ex dem. Goveneur v. Robertson,* 11 Wheat. 332, 6 L. Ed. 488 as follows:

> "That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary."

In *McKinley Creek v. Alaska United* the appellants contended that the appellee had to show an exclusive right to the possession of the ground, although validity of the location could not be attacked by appellants. The court pointed out that the possession was one of the incidents of the location so that if the location could not be attacked by appellants, neither could an incident of that location. The same reasoning applies to the argument of appellants in the instant case. The right to maintain a suit to quiet the title is one of the incidents of the locations so that since appellants cannot attack the validity of the locations, they cannot attack the right of appellee as an alien to maintain this suit. It is a matter of substantive law and not one of procedure, but even so there is no procedural rule against aliens maintaining such suits.

The same has been held in a long line of cases, such as *Ginaca v. Peterson,* 262 F. 940, 910 (9th Cir.), wherein the plaintiff was an alien who obtained a decree quieting title to mineral lands; *Perley et al. v. Goar,* 195 P. 532, a suit to enjoin trespassers wherein the Supreme Court of Arizona held that the citizenship of the locator cannot be raised or determined in actions between private individuals wherein the government is not a party, and 58 CJS 74.

As stated in Lindley on Mines, 3rd Ed. Vol. 1, Sec. 233 P. 517:

> "The lands are the property of the government. It alone has the power to object and inquire into the qualifications of the locator. 'With regard to

> the peace of society and a desire to protect the individual from arbitrary aggression' the government reserves to itself the right to inquire into these qualifications."

Appellants cite only one case in support of their position and that is a decision of this court in *Vedin v. McConnell,* 22 F.2d 753, 756. We fail to see any comfort to be derived by appellants therefrom. They claim it indicates that had Vedin still remained an unpardoned, imprisoned felon, his location while on parole would be void and not simply voidable. The court did not make any such implication. The court decided only that since Vedin had gained a full pardon after he made his location and before any intervening rights had been obtained by others, his location became perfected upon obtaining the full pardon, regardless of whether it might have been void or voidable had he not received such pardon. In other words this court did not find it necessary to decide what its holding would have been if no pardon had been granted. On the other hand, the court indicated that if no pardon had been obtained, it would have to give consideration to:

> a. The fact that the suspension of civil rights during a term of imprisonment and parole on which McConnell depended, was derived from a local law applicable in Alaska but not applicable in other places, with the result that a prisoner from Alaska on parole has no civil rights while in other places he has, and if this statute is held to suspend the rights of citizens to stake mining

claims, then the mining laws with respect to citizenship, which Congress alone can regulate, would be varied in their application.

b. One of the purposes of the parole law is to help the prisoner adjust and reinstate himself in society in any honest employment and that this law "must be taken as in some measure qualifying the rule of civiliter mortuus, we have no doubt."

Appellee maintains this dictum by the court was meant to imply that if it did not decide the point on the basis of the pardon it would have great difficulty deciding that the suspension of civil rights during imprisonment and parole in Alaska suspends the rights given all citizens to locate mining claims. We think the citations following the paragraph containing the decision in these words is particularly noteworthy, to wit:

Our conclusion therefore, is that, even though it be held that plaintiff was not competent, during the term of his sentence, to take such a grant as is implied by the location of a mining claim, upon the expiration of such term, no other right intervening, the grant became effective and related back to the date of the location. We think the principles recognized in Shea v. Nilima (C.C.A.), 133 F. 209, and McKinley v. Alaska M. Co., 183 U. S. 563, 22 S. Ct. 84, 46 L. Ed. 331 are clearly applicable.

The above reference to the principles in the cases cited is the only part of the decision in *Vedin v. McConnell* which has any bearing on the validity of the

claims of appellee in the instant case and there is no comfort therein for the appellants.

POINT 18.

THE JUDGMENT WAS NOT CONTRARY TO LAW OR TO THE PREPONDERANCE OF THE EVIDENCE.

Reviewing the testimony as a whole it is apparent that appellee and his assistant Norppa proceeded in the fall of 1952, in good faith and with determination to comply with all laws for locating and recording notice of the appellee's claims and did much more than substantially comply with the laws. In fact much more than is ordinarily done in locating claims. Neither they nor anyone else saw any evidence of any locations made by appellants in 1950 and the summer of 1952, although the witness Engdahl claimed to have brushed some lines, built some monuments and blazed corner stakes in 1950 (Tr. 516-518) on quite a few claims. The appellants had the same opportunity to prove their locations by surveys and competent witnesses to show what evidence existed on the ground as to how and where the claims were located by Mr. Pape; but they offered no evidence except these meager statements of Mr. Engdahl to support their locations whereas appellee proved by competent surveyors, a highly qualified forester, appellee and his assistant Norppa that all the acts of locating valid claims were performed.

It is apparent in reviewing the whole record that Mr. Pape recorded notices in the office of the recorder and nothing more.

It is also apparent why Mr. Pape made no effort to take the witness stand and testify as to his locations, especially after having been unable to show Mr. Harrigan in the spring of 1953 a single mining claim or any evidence of one except an old notice of the Nina claim which appellants never again mentioned, and since he so glibly revealed to Mr. Harrigan his system of locating claims without any blazed or otherwise marked lines (Tr. 665) and five posts which nobody could find although much of the country was fairly open and at high elevations was wide open. There is no evidence of any discovery by Mr. Pape or his adopting a discovery by someone else.

The court's opinion is not only supported by enough evidence on every point but is supported by an overwhelming preponderance of the evidence. It should be sustained.

Dated, Juneau, Alaska,
January 12, 1955.

Respectfully submitted,

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N. C. BANFIELD,
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(Appendix Follows.)

Appendix.

Appendix

RULE 4, UNIFORM RULES OF THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, EFFECTIVE APRIL 30, 1953.

Rule 4. Interlocutory Applications — Evidence.

Upon the hearing of any application for an interlocutory order, the facts shall be presented by affidavits or other documentary evidence, unless the court upon application and cause shown shall permit oral evidence to be introduced.